**Cours 3 - Préparation**

**Chapter 6 of book by Greenberg, Kee and Weeramantry ;**

1. **The arbitral tribunal: Introduction:**

* Redfern, Hunter: ‘[t]he reputation and accept- ability of international arbitration depends on the quality of the arbitra- tors themselves’
* The composition of the arbitral tribunal can significantly affect a range of important factors including:
  + whether the arbitration is conducted efficiently and economically,
  + whether the award is susceptible to challenge,
  + and even an individual party’s chances of success or failure.

Issues surrounding the constitution of the arbitral tribunal therefore deserve special attention.

* Life cycle of an arbitral tribunal chronologically

1. **Constitution of the arbitral tribunal**

* the main pple guiding appointment of arbitrators is party autonomy
  + in their contract or even after a dispute arises, parties are free to agree on the number of arbitrators, how they will be appointed and who they will be
    - when no agreement: the applicable arbitration rules or procedural law will provide a fallback mechanism to prevent the constitution process from being frustrated

1. Numbers of arbitrators

For obvious reasons, the number of arbitrators should be odd – usually one or three, but occasionally five. Parties often specify the number of arbitrators in their arbitration agreement, or agree on it once the dispute has arisen.

ICC statistics show that when the number of arbitrators is determined by party 6.8 agreement, the number agreed is usually three. In 2008, a three-member tribunal was appointed in 61% of ICC arbitrations. In 93.5% of those cases, the number of three was determined by party agreement rather than by the ICC Court.10 This is different for sole arbitrator cases. In the ICC arbitrations where there were sole arbitrators in 2008, the parties decided the number in only 69.4% of cases. In the remaining 30.6% of cases, it was the ICC Court which decided that there would be a sole arbitrator

4 approaches:

* default of one, but parties can require three
* one or three depending on the case
* depending on the amounts at stake
* default three (Model Law)

1. Procedure for constituting the arbitral tribunal

All institutional arbitration rules recognise the principle of party autonomy by allowing parties to agree on the procedure for constituting the arbitral tribunal and to participate in its constitution.

* Should party autonomy fail, all rules provide a default process to ensure that the arbitral tribunal is constituted and that the arbitration proceeds.
* **By adopting arbitration rules in their arbitration agreement, the parties voluntarily agree to this default process.** 
  + The appointment of arbitrators by an **‘appointing authority’** or institution, as specified in the arbitration rules, is therefore entirely consistent with party autonomy.
    - If failure: then court
* It is not advisable to attempt to select arbitrators before a dispute has arisen.
  + While a perceived advantage is that the arbitral tribunal composition will be faster and more certain, difficulties arise when the named person passes away in the interim period or for some other reason is unable or unwilling to act once a dispute arises.
    - Additionally, that person might, in the course of his or her personal life or professional activities since the arbitration agreement was made, have developed a conflict of interest.
* Rather than identifying a specific arbitrator in the arbitration agreement, a bet- 6.25 ter practice is to identify in advance an appointing authority (which could even be an individual identified by his or her position) or institution charged with selecting arbitrators if the parties cannot agree

1. Multiparty arbitration

* Prior to 1992, unless there was a contrary agreement by the parties, multiple claimants or respondents were ordinarily required to act as one during the composition of the arbitral tribunal. In other words, if a claimant commenced arbitration against two respondents, those two respondents would jointly be expected to nominate one co-arbitrator, whereas the claimant was entitled to nominate the other co-arbitrator.
  + In the now famous French Dutco case,32 two respondents argued that because they had different interests they should each be allowed to appoint an arbitrator.
  + The ICC arbitration agreement in that case provided for two party-nominated arbitrators, one nominated by each side.
    - The third and presiding arbitrator was to be selected by the co-arbitrators. The multiple respondents agreed under protest to appoint one co-arbitrator jointly and then later challenged the award, arguing that the arbitral tribunal had been improperly constituted. The French Cour de Cassation agreed, finding that equality in the appointment process was fundamental to arbitration and, under the particular circumstances, equality was lacking in the disputed appointment process.
* This decision prompted the ICC, the next time it amended its arbitration rules, to modify the appointment procedure in multi-party cases in order to ensure equality.
* **Consequently, Article 10 of the 1998 ICC Rules provides that if the multiple claimants or multiple respondents cannot agree on a candidate for joint nomination, then the ICC Court may appoint all three arbitrators – thus restoring equality because neither side is permitted to choose an arbitrator.**
  + Consequent changes in other arbitration institution
    - China only on ever considered that solution
      * CIETAC rules: choose the arbitrator for the party that could not agree
    - in Ace Pipeline Contracts Private Ltd v Bharat Petroleum Corporation Ltd36 the Indian Supreme Court upheld an arbitration clause contained in a contract which designated the marketing director of one of the parties as the arbitrator, and expressly denied the opposing party the right to object to the independence of that arbitrator on that ground
* **The main concern of the Dutco principle is to ensure equality in multi-party arbitrations.**
* Two aspects of equality must be respected.
  + The first is that all par- ties to the arbitration agreement must agree to and be aware of the appointment process. This may seem a somewhat trite observation.
    - However, this was missing among the Dutco participants. The ICC Rules in force at that time did not contain a specific procedure for multiparty arbitrations, so no process had been agreed.
  + Second, all parties should be treated equally meaning that, in certain circumstances, if one party loses the right to nominate an arbitrator so should all.

1. **Choosing an arbitrator**

* The autonomy of parties to choose arbitrators is a frequently cited benefit of arbitration.
* When considering what is desired in an arbitrator, it is useful to distinguish between qualifications and qualities.
  + Qualifications should be given its natural meaning, which involves some kind of formal, recognised training.
  + Qualities, on the other hand, are attributes.
* These may not be tangible or easily definable, as they may be something esoteric such as the manner in which an arbitrator approaches a problem.

1. Qualifications of an international arbitrator

* As a general rule there are no formal qualifications necessary to become an international arbitrator.
  + Legal knowledge and experience is not required but is highly desirable.
* Most arbitration laws and rules do not provide any required qualifications for arbitrators.
  + Japan:
    - Only licensed lawyers: “Bengoshi”
  + North Korea: Article 19 of the External Arbitration Law
  + Indonesia
  + Taiwan
  + South Korea
  + Bangladesh: rather unusually, provide rules for disqualifications
* However, most arbitration in the Asia-Pacific do not require any particular qualifications for arbitrators
* The qualifications of arbitrators can affect the manner in which courts may review any resulting arbitral award:
  + *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd*
    - Where the arbitrator chosen by the parties is legally qualified, it will be harder to obtain leave to appeal the arbitral decision on a question of law. As Lord Donaldson of Lymington MR stated in *Ipswich Borough Council v Fisons PLC* [1990] at p 724, if the chosen arbitrator is a lawyer and the problem is purely one of law, the parties must be assumed to have had good reason for relying on that lawyer’s expertise.
  + In 2004, a further statement was made in another New Zealand case, *Methanex* 6.47 *Motunui Ltd v Spellman*
* It is usually preferable not to provide for any strict qualifications of arbitrators in the arbitration clause as this may unduly burden the appointment process once a dispute arises.

1. Qualities of an arbitrator

* Qualities of an arbitrator concern the individual’s attributes. There are a number of generic attributes relevant to most arbitrators, such as language abilities and experience. Beyond that, a distinction can be drawn between qualities that are desirable in a chairperson or sole arbitrator, compared to those desirable in a party-nominated co-arbitrator.
  + Also consider the qualities of the tribunal as a whole
    - Three-member arbitral tribunal composed of arbitrators of three different nationalities: maximization of cultural adaptability
  1. Chairpersons and sole arbitrators
* The chairperson must be fair and be seen to be fair so as to inspire and maintain 6.54 the confidence of the parties and co-arbitrators.
* He or she must also have an ability to control the parties, manage the co-arbitrators and conduct the proceedings efficiently
* The qualities desired of sole arbitrators are similar to those of chairpersons, except that sole arbitrators are not required to manage co-arbitrators and the additional powers allocated to chairpersons are obviously not applicable
  1. Party nominated co-arbitrators
* Particular qualities are sought in party-nominated co-arbitrators.
  + These are often qualities which the appointing party perceives as suggesting that the arbitrator’s presence on the arbitral tribunal will increase its chances of success.
  + Of course, arbitrators – regardless of how they are appointed – are duty-bound to act at all times with impartiality and independence, and must not blindly support the party that nominated them
* That said, an individual arbitrator’s views on or approach to particular issues might be known or expected. An aspect of the person’s legal, cultural or other background or experience may mean he or she is likely to take a particular approach.
  + **Martin Hunter: ‘*when I am representing a client in an arbitration, what I am really looking for in a party nominated arbitrator is someone with the maximum predisposition towards my client but with the minimum appearance of bias’***.
  + He gives the example that ‘*in representing a government who has nationalised an oil company I’m not likely to choose an investment banker from a capitalist country with many years experience of battling for investors in less developed countries or someone who has published a series of articles showing that he has a conservative viewpoint on the interpretation of the phrase “prompt, adequate and effective” compensation’*
  1. Pre appointment interview
* It has become common for counsel and even parties to interview prospective arbitrators and in particular co-arbitrators before deciding whether to appoint them. This is another form of the due diligence parties will conduct on arbitrators.  Not surprisingly, this practice is sometimes controversial because it can lead to a perception of partiality. However, it is not prohibited and can be beneficial if used wisely and within ethical limits.
* For the benefit of both the party and the arbitrator a precise record of the interview should be made and provided to the opposing side once the arbitrator has been appointed.

1. **Formal appointment of arbitrators**

* It is important to distinguish between the nomination and the appointment of an arbitrator.
  + Simply because a person is nominated (or proposed) to act as arbitrator does not impose an obligation on him or her to accept the nomination.
    - Much like an ordinary contract for services, the position hinges on the principles of offer and acceptance. The nomination only binds the arbitrator once accepted.
    - As reviewed below, the arbitrator’s acceptance of the nomination may be all that is required to appoint an arbitrator but under certain rules the acceptance may constitute only a pre-condition to appointment.
  + The point at which appointment occurs can be of importance as it carries certain effects. It is generally only when an arbitrator has been appointed that he or she may be afforded immunity from civil liability.
    - Also the process can vary under some institutional rules: maybe steps to be taken to be appointed officially

1. **Obligations of arbitrators**

* ‘International arbitrators should be impartial, independent, competent, diligent 6.76 and discreet.’ Such is the first line of the Introductory Note of the 1987 IBA Rules of Ethics for International Arbitrators.
  + This guideline highlights the fact that being an arbitrator carries certain duties and obligations.
  1. General obligations and potential liability
* In accepting an appointment, arbitrators agree to the inherent duties of care and diligence attached to their role.
  + These duties may not be spelt out in arbitration rules but are nonetheless implied. As part of these duties, arbitrators should make themselves available and be able to devote the time and effort necessary to read the parties’ submissions carefully, examine the evidence produced, attend all meetings and hearings, and work on producing a quality award after a thorough, unbiased analysis of the entire case.
* **Born suggests that the obligations of international arbitrators can be summarized as:**
  + **a duty to resolve the parties’ dispute in an adjudicatory manner;**
  + **a duty to conduct the arbitration in accordance with the parties’ arbitration  agreement;**
  + **a duty to maintain the confidentiality of the arbitration;**
  + **in some contexts, a duty to propose a settlement to the parties;**
  + **and a duty to complete the arbitrator’s mandate.**
* As briefly referred to above, some international arbitration laws provide arbitrators with protection from civil law suits.
  + Although the precise wording differs slightly between the various legislation, for obvious reasons immunity is not generally given in situations where there has been fraud or some similar intentional dishonesty on the part of the arbitrator. (…)
* Most international arbitration rules also contain an exclusion of liability provision to protect arbitrators and arbitral institutions from civil liability.
  + In early  **2009 a decision of the Paris Court of Appeal** caused concern among the arbitration community when it suggested that the ICC Court could not validly exclude liability for acts or omissions in the performance of its essential duties.
    - Reasoning directed to an arbitral institutions but could be applied mutatis mutandi to arbitrators
* While arbitrators and arbitral institutions should be accountable for their actions or omissions, it is important they are able to perform their functions without fear of spurious liability claims. Given the considerable sums of money frequently involved in international commercial arbitrations, potential exposure to civil liability claims could have detrimental consequences on the manner in which arbitrators and institutions conduct arbitrations.
  1. Disclosure obligations
* Arbitration laws and rules impose a duty of disclosure of all facts or circumstances that may give rise to justifiable doubts as to the arbitrator’s impartiality or independence.
* **Impartiality and independence represent core obligations of an arbitrator**.
  + They are so widely recognised that they amount to general international principles and are therefore incumbent on any arbitrator in all circumstances.
* All arbitration laws and rules require arbitrators to be and remain independent, although there is variation in the precise language used.
  + The concepts of impartiality of independence are closely related but not exactly the same

1. General principles of disclosure

* Most laws and rules require prospective and serving arbitrators to disclose to the parties any circumstances that might give rise to a reasonable doubt about their independence or impartiality
  + Article 12(1) of the Model Law:
    - When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him
* Depending on the arbitration rules, the arbitrator may have to sign a declara- 6.92 tion or statement of independence when appointed.
  + Article 7(2) of the ICC Rules provides in this regard:
    - Before appointment or confirmation, a prospective arbitrator shall sign a statement of independence and disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator’s independence in the eyes of the parties. The Secretariat shall provide such information to the parties in writing and fix a time limit for any comments from them.
* Once a declaration of this kind has been made, a presumption exists that the arbitrator is impartial and independent as at the date of the declaration
  + The onus of rebutting that presumption lies with the party bringing the challenge
    - * CA, 12 Février 2009 : A recent decision of the Paris Court of Appeal suggests that an arbitrator’s actual knowledge of a potential conflict of interest involving his law firm is not necessary, and that constructive knowledge may be sufficient to disqualify the arbitrator
        + Cour de Cassation: quelles suites?

1. IBA Guidelines

* The different national tests, as well as cultural attitudes towards impartiality and 6.95 independence, can create doubts as to what an arbitrator must disclose.
* The IBA has noted that ‘even though laws and arbitration rules provide some standards, there is a lack of detail in their guidance and of uniformity in their application.
  + As a result, members of the arbitration community often apply different standards in making decisions concerning disclosure, objections and challenges’.
* Do not have force of aw but referred to by parties, arbitrators and courts
* The IBA Guidelines consider various scenarios concerning when issues as to impartiality and independence arise and when they do not.
* For ease of reference, these are then categorised by colour – red, orange, and green.
  + Situations described in the **Red List** are those which create a conflict of interest. This list is divided into two sub-categories: the ‘non-waivable Red List’ and the ‘waivable Red List’.
    - Situations described in the **non-waivable Red List** give rise to a conflict of interest which automatically disqualifies arbitrators from accepting or continuing their mandate, regardless of whether a party has challenged the arbitrator. (…) This means a conflict of interest exists that must be disclosed.
    - The effect of a **waivable Red List** categorisation is that the arbitrator cannot continue to act unless the parties agree otherwise.
  + The **Green List** covers situations which do not give rise to a conflict of interest and, according to the IBA Guidelines, need not be disclosed.
  + In-between situations fall into the tricky **Orange List,** which is ‘a non exhaus- tive enumeration of situations which (depending on the facts of a given case) in the eyes of the parties may give rise to justifiable doubts as to the arbitrator’s impartiality or independence’.
* Also important: IBA Guidelines: non exhaustive!

1. **Challenges to arbitrators**

* After formal appointment of an arbitrator, that arbitrator can be challenged. A successful challenge will result in the impugned arbitrator’s removal.
* Ordinarily, he or she will be replaced but sometimes the remaining arbitrators can proceed without such a replacement.
  + The possibility for parties to challenge arbitrators ensures the integrity of the arbitration process.
* There are two main grounds on which to challenge an arbitrator:
  + partiality or lack of independence, and
  + misconduct.

1. **Challenges for partiality or lack of independence**

The underlying purpose of independence or impartiality requirements is to ensure that the parties are treated equally and that the award is not influenced by an arbitrator’s bias. What matters most, therefore, is ensuring that the arbi- trator is free of any influence on his or her decision-making. It follows that a party should be entitled to challenge an arbitrator who it considers to be lacking impartiality for any reason.

1. Impartiality and independence distinguished

* Most laws and rules use ‘independence’ and/or ‘impartiality’ as the operative language to test arbitrator bias
  + Clearer than neutrality
  + Distinct definition of both terms are thus extractable from scholarly writings
* A generally accepted definition of independence is the absence of actual, identifiable relationships with a party to proceedings or someone closely connected to the party.119 The test for independence examines the appearance of bias and not actual bias120 and is thus entirely objective.
  + Tangible elements
* Impartiality, in contrast to independence, is a subjective concept, concerned with the tendency of an arbitrator actually to favour one of the parties’ positions. Impartiality is not concerned with the outside appearance of bias. It does not necessarily require tangible relationships that could be the cause of the arbitrator acting unfairly. It examines the likelihood of an arbitrator actually having a state of mind or prejudgment that favours one side in the dispute.
  + Difficult to proove
* Use of factual elements

1. Procedure

* The procedural aspects of the challenge process will be determined by any express provisions of the arbitration agreement itself, the parties’ choice of arbitration rules or the lex arbitri.
  + Model Law Artcile 13
* There are three possible scenarios once a challenge is filed and before that chal- lenge is determined.
  + The opposing party may agree to the challenge:
    - Termination of the mandate
  + The resignation of the arbitrator (ICC not always accept an arbitrator’s resignation in these circumstances)
  + Third scenari: most frequent: the arbitrator does not resign and the opposing party contests the challenge:
    - In this scenario, a decision on the merit of the challenge will have to be taken

*Article 13 – Challenge procedure*

(1)  Thepartiesarefreetoagreeonaprocedureforchallenginganarbitrator,subject to the provisions of paragraph (3) of this article.

(2)  Failingsuchagreement,apartywhointendstochallengeanarbitratorshall,within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3)  If a challenge under any procedure agreed upon by the parties or under the pro- cedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

* A party wishing to challenge an arbitrator should do so as soon as practicable after it becomes aware of the facts leading to its concern
  + Significant costs involved
  + Risk of unvoluntary waiver
* Challenge needs to be brought within a certain time (15/30 days) from when the arbitrator was appointed, or, if later from when the challenging party became aware of the facts giving rise to the challenge
  + Ex: Grey District Council v Banks
    - Overcame the time limit: so unsatisfactory solution, but no choice
      * However, although time limits such as these may preclude the removal of an arbitrator, there may still be grounds to have an award set aside or to resist its enforcement on the basis the arbitrator was not independent

1. Assessment of impartiality and independence by arbitral institutions

* Since arbitration is in principle confidential, the decisions of arbitral institutions on any matters (including challenges) are usually kept confidential and not dis- closed. Moreover, the general practice of arbitral institutions is not to provide reasons for their decisions, either to the challenged arbitrator, any other arbitrators or to the parties.
  + More and more numbers/examples on the institutions Website ICC for instance
* Challenge against international arbitrators must be determined on a case by case basis
  + Which is contrary to the publication of a body of precedents
* ICC: number of stages at which the ICC Court may consider whether an arbi- trator is independent.
  + Confirmation (official start of the mission)
  + Statement of independence
  + If the content is validated: “qualified statement of independence”
  + The parties have then an opportunity to challenge the arbitrator’s confirmation

1. Assessment of impartiality and independence by domestic courts

* An arbitrator’s (or a judge’s) impartiality and independence is a public policy mat- ter. Therefore, in principle the courts maintain ultimate control over determining whether an arbitrator is independent and impartial. The fact that a challenge to an arbitrator is dismissed by an arbitral institution competent to decide the challenge in accordance with its rules does not in and of itself prevent a court from setting aside an award on the ground that, under its own standard, the challenge should have succeeded.

1. **the different tests used by domestic courts ????**

* Several test, then Lord Goff considered the issue in R v Gough
* Now: the ‘Gough test’ enquires ‘whether there was any real danger of uncon- scious bias on the part of the decision maker . . . ’
  + this test was followed in :
    - Laker Airways Inc v FLS Aerospace Ltd
    - AT & T Corporation and Lucent Technologies Inc v Saudi Cable Co
* Then: Porter v Magill:
  + Lord Hope phrased the test as ‘whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the arbitral tribunal was biased’
* The reasonable apprehension test: New Zealand is Muir v Commissioner of Inland Revenue: overruled Gough
  + - Two stage inquiry:
      * Establish the actual circumstances which have a direct bearing on a suggestion that possible bias
      * Ask whether those circumstances as established might lead a fair-minded lay observer to reasonably apprehend that the judge might not bring an impartial mind to the resolution of the case
  + Re Shankar Alan S/O Anant Kulkarni
    - Chan Sek Keong J in fact emphasised that the concern was not whether there is in fact a real likelihood or possibility of bias, but simply whether a reasonable man without any inside knowledge might conclude that there was an appearance of it.
  + Lee Hong Dispensary Superstore Co Ltd v Pharmacy and Poisons Board
    - Applicable test for apparent bias may be found in : Deacons v White & Case Ltd Liability: “reasonable apprehension test”
    - Lee Hong Dispensary was then placed by a higher court under Porter v Magill
    - Lee Hong Dispensary: reaffirmed by the judge in another HK case: Suen Wah Ling t/a Kong Luen Construction Engineering Co v China Harbour Engineering Co (Group)
  + Indonesia: Seraya Sdn Bhd v Government of Sarawak
    - Question of a real danger?

1. Selected court decisions on partiality and lack of independence
2. Inappropriateness of using the same bias test for judges and arbitrators
3. The standard for party nominated co-arbitrators

* It is not clear whether the standard for deciding whether an arbitrator is independent or impartial should be applied equally to all arbitrators.
  + In some jurisdictions like the US, there is sometimes said to be a greater expectation and therefore perhaps tolerance that party-nominated arbitrators will pursue the interests of the nominating party.
* **Most experienced arbitrators say that they do not feel a particular duty toward the party that nominated them**, **but tend to pay particular attention to the arguments presented by that party**.
  + This is perfectly acceptable and does not mean that the arbitrator will necessarily favour the position of the nominating party or try to influence the other arbitrators in that respect. The same standard for impartiality and independence can therefore be applied to all arbitrators, regardless of who nominated the arbitrator.

1. Impartiality and ar-med or med-arb

* Arb-med is a dispute resolution process which combines arbitration and mediation.
  + The mediation, if it occurs, will take place with the parties’ con-sent at an appropriate stage during the arbitration proceedings.
  + A more common variation is med-arb, where arbitration is preceded by mediation.
* Issues of impartiality will not arise in connection with the arb-med or med-arb processes if the arbitrator and mediator are different people.
  + But it may be the same individual who is asked to wear both hats. In those circumstances the question of impartiality becomes very real.
    - In such a case: as a practical matter, it would seem highly advisable for arbitrators to seek not only the parties’ agreement in writing, but also to have the parties waive challenge rights which may arise from the mediation process. Naturally, such a waiver would not affect the arbitrator’s duty to act independently and impartially.

1. **Challenges for misconduct**

Most arbitration rules and laws provide a mechanism for removing arbitrators for reasons other than relating to their independence or impartiality. Arbitrators can be removed for misconduct or when they fail to perform their functions, or fail to perform them in good time.

1. Definition and procedure

* Misconduct is not a term used in the Model Law or international arbitration statutes generally.
  + 2002 the Singapore High Court
* Article 14 of the Model Law provides for removal of an arbitrator who ‘becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay’.
  + The mechanism in Article 14 is very different from Article 13 (which deals with challenges as to independence and impartiality) because it provides a direct route to the court and is not time limited.
    - A court is only able to intervene to keep the arbitration moving when it has effectively stopped – albeit by the drastic measure of removing the arbitrator.

1. Arbitral institutions decisions on misconduct

* As noted above, the fact that arbitration is in principle confidential means that published decisions of arbitral institutions are rare. Nonetheless, some examples of ICC Court decisions on the removal of arbitrators have been made public

1. Court decisions on miscondonct

* Most allegations of arbitrator misconduct heard before courts tend to involve matters of procedure.
* A common expression associated with court-based applications of this kind is that a party has ‘lost confidence’ in the arbitrator’s ability to perform his or her duties.
  + This appears to have derived from the notion of misconducting the arbitration.

1. **Resignation and replacement of arbitrators**

Challenging an arbitrator is not the only circumstance in which a vacancy may occur on an arbitral tribunal. An arbitrator may resign his or her appointment, be subjected to an agreement by the parties to replace him or her, or may pass away during the course of the arbitration. This usually leads to replacement.

1. Resignation of arbitrators

It is always possible for an arbitrator to resign. The decision to resign is sig- nificant and should not be taken lightly. An arbitrator should only resign in circumstances where the integrity or efficiency of the arbitral process would be compromised by the arbitrator’s continued involvement.

Two arbitral institutions reserve the power to refuse to accept an arbitrator’s tender of resignation. They are the Bangladesh Council of Arbitration and the ICC Court

1. Agreements to replace arbitrators

Concerning party agreement to replace an arbitrator, one might expect that where all parties agree on replacement, the arbitrator would step down. This did not happen in one ICC Court case in 2008. The parties there agreed that the co-arbitrator nominated by claimant should be replaced because, despite what was stated on his curriculum vitae, he was not able to work in the language of the arbitration without the assistance of translators and interpreters.

The ICC Court took note of the parties’ agreement, in accordance with Article 12(1) of the Rules, and replaced the arbitrator with a new nominee provided by the claimant

1. Replacement of arbitrators

When an arbitrator resigns or is removed, the question of how to proceed with the arbitration inevitably arises. If the arbitration is institutional, the rules will contain a procedure to appoint a replacement. This is usually the same method adopted for the original appointment

The other aspect to the question of how to proceed concerns the conduct of the arbitration itself – and in particular whether it is necessary to repeat previous proceedings. In some instances it may be necessary and appropriate to provide the new arbitrator with an opportunity to hear witness testimony and oral sub- missions made prior to his or her appointment. In other instances, simply reading the transcript and submissions may be sufficient, thus saving considerable time and expense.

**IBA Guidelines on Conflicts of Interest in International Arbitration (pp. 169-189 of the Syllabus);**

* Problems of conflicts of interest increasingly challenge international arbitration
  + What to disclose?
  + More and more disclosures and at the same time more difficult conflict of interest issues to determine
  + Some standards exists but no details

Thus, parties, arbitrators, institutions and courts face complex decisions about what to disclose and what standards to apply. In addition, institutions and courts face difficult decisions if an objection or a challenge is made after a disclosure. There is a tension between, on the one hand, the parties’ right to disclosure of situations that may reasonably call into question an arbitrator’s impartiality or independence and their right to a fair hearing and, on the other hand, the parties’ right to select arbitrators of their choosing. Even though laws and arbitration rules provide some standards, there is  a lack of detail in their guidance and of uniformity in their application. As a result, quite often members of the international arbitration community apply different standards in making decisions concerning disclosure, objections and challenges.

The Committee on Arbitration and ADR of the International Bar Association appointed a Working Group of 19 experts1 in international arbitration from 14 countries to study, with the intent of helping this decision-making process, national laws, judicial decisions, arbitration rules and practical considerations and applications regarding impartiality and independence and disclosure in international arbitration.

* + Greater consistency is needed
  + Fewer unnecessary challenge
* Originally: only commercial arbitration but should apply to other types of arbitration
* **These Guidelines are not legal provisions** and do not override any applicable national law or arbitral rules chosen by the parties.
* The IBA and the Working Group view these Guidelines as a beginning, rather than an end, of the process. The Application Lists cover many of the varied situations that commonly arise in practice, but they do not purport to be comprehensive, nor could they be.

**Part 1: General standards**

* 1° General principle

*Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so during the entire arbitration proceeding until the final award has been rendered or the proceeding has otherwise finally terminated.*

* 2° Conflict of interest
* 3° Disclosure by the arbitrator
  + Prior to the acceptance but also at any stage of the proceedings
  + if hesitation: then disclosure
* 4° Waiver by the parties
  + 30 days
* 5° Scope
* 6° Relationships
  + lawyer: client/state
    - entity of a group of company: case by case approach
* 7° Duty of arbitrators and parties
  + information about any direct or indirect relationship
  + provide any available information and shall perform a reasonable seach of publicly available information

**Part 2: Practical**

The purpose of the disclosure is to inform the parties of a situation that  they may wish to explore further in order to determine whether objectively — ie, from a reasonable third person’s point of view having knowledge of the relevant facts — there is a justifiable doubt as to the arbitrator’s impartiality or independence.

* Later challenge based on the fact that an arbitrator did not disclose such facts or circumstances should not result automatically in either non appointment, later disqualification or challenge to any arbitral award
* The borderline between the situations indicated is often thin.
* Guidelines: very practical so should provide specific guidance
* 3 lists
  + Red list: situations which, depending on the facts of a given case, give rise to justifiable doubts as to the arbitrator’s impartiality and independence; ie, in these circumstances an objective conflict of interest exists from the point of view of a reasonable third person having knowledge of the relevant facts
    - Non waivable red list: disclosure cannot clear the conflict
    - Waivable red list: serious but not as severe
  + Orange list: specific situation that in the eyes of the parties may give rise to justifiable doubts as to the arbitrator’s impartiality or independence
    - Duty to disclose
    - Disclosure not automatically results in disqualification
      * In the view of the Working Group, non-disclosure cannot make an arbitrator partial or lacking independence; only the facts or circumstances that he or she did not disclose can do so.
  + Green list: specific situations where no appearance of, and no actual, conflict of interest exists from the relevant objective point of view. Thus, the arbitrator has no duty to disclose situations falling within the Green List.
* The orange list is by far the longest

**Hrvatska Elektroprivreda d.d. v. Republic of Slovenia (ICSID Case No. ARB/05/24), Order Concerning the -Participation of a Counsel (6 May 2008) (attached); and**

The Claimant is deeply troubled by this development and seeks an order from the Tribunal that the Respondent refrain from using the services of Mr. Mildon QC. This raises two central issues: Does the Tribunal have the power to make such an order, and, if so, should it do so in the circumstances of this case?

The Tribunal's conclusion about the substantial risk of a justifiable apprehension of partiality leads to a stark choice: either the President's resignation (which, as noted, neither Party desires), or directions that Mr. Mildon QC cease to participate in the proceedings. In the light of the cardinal rule of immutability of Tribunals, (Article 56(1) of the Convention), resignation of its President is a course of action that the Tribunal simply cannot endorse in the present circumstances.

The Tribunal disagrees with the contention of Respondent that it has no inherent powers in this regard. It considers that as a judicial formation governed by public international law, **the Tribunal has an inherent power to take measures to preserve the integrity of its proceedings**.

* Exclusion of the Barrister

**Arrêt de la Court de Cassation, Premiere chambre civile, du 25 juin 2014, dans l’affaire Tecnimont (in particular, pp. 3-4, attached).**

**Règlement CCI**:

Selon le règlement CCI, la demande de récusation d'un arbitre doit être envoyée, à peine de forclusion, dans les 30 jours suivant la date à laquelle la partie introduisant la demande a été informée des faits et circonstances fondant cette demande.

**Arrêt CCass:**

CASSE ET ANNULE, en toutes ses dispositions, l'arrêt rendu le 2 novembre 2011, entre les parties, par la cour d'appel de Reims ; remet, en conséquence, la cause et les parties dans l'état où elles se trouvaient avant ledit arrêt et, pour être fait droit, les renvoie devant la cour d'appel de Paris, autrement composée

(…)

Attendu que, pour dire le moyen d’annulation recevable, l’arrêt retient que le juge de l’annulation n’est pas lié par le délai de recevabilité de la demande de récusation auprès de l’institution d’arbitrage, que la société Tecnimont soutient être dépassé le 14 septembre 2007 parce que la société Avax aurait eu au plus tard connaissance des événements motivant sa récusation entre le 16 juillet, lorsqu’elle a commencé à interroger M. Jarvin sur la conférence de Londres, et le 26 juillet 2007, date de la première réponse de ce dernier ; qu’il retient encore que l’absence de toute demande de récusation ultérieure contre M. Jarvin devant la CCI pour d’autres faits découverts par la recourante, selon ce que dit la société Tecnimont, entre la demande de récusation du 14 septembre 2007 et la sentence partielle du 10 décembre 2007, puis après la sentence jusqu’au 1er avril 2008, date à laquelle M. Jarvin a démissionné, n’interdit pas à la société Avax de critiquer la sentence dans la mesure où celle-ci n’a pas renoncé ; qu’après avoir relevé que **la société Avax avait à plusieurs reprises, tout d’abord, interrogé le président du tribunal arbitral sur l’étendue des liens entre le cabinet Jones Day, dans lequel il exerce, et la société Tecnimont, ainsi que d’autres sociétés s’y rattachant, tout en menant en parallèle des investigations, puis, réservé ses droits, l’arrêt en déduit qu’il n’est pas permis de conclure à une renonciation de la société Avax à invoquer le grief du manque d’indépendance de M. Jarvin en raison du non-exercice de la procédure de récusation devant la CCI** ;

Qu’en statuant ainsi, alors que la partie qui, **en connaissance de cause, s'abstient d'exercer, dans le délai prévu par le règlement d'arbitrage applicable**, son droit de récusation en se fondant sur toute circonstance de nature à mettre en cause l'indépendance ou l'impartialité d'un arbitre, **est réputée avoir renoncé à s'en prévaloir devant le juge de l'annulation**, **de sorte qu’il lui incombait** **de rechercher si, relativement à chacun des faits et circonstances qu’elle retenait comme constitutifs d’un manquement à l’obligation d’indépendance et d’impartialité de l’arbitre, le délai de trente jours imparti par le règlement d’arbitrage pour exercer le droit de récusation avait, ou non, été respecté, la cour d’appel n’a pas donné de base légale à sa décision** ;

**La semaine juridique du 21 juillet 2014, Seraglini**:

4. - Nouvel épisode sur le principe d'indépendance et d'impartialité de l'arbitre dans l'affaire Tecnimont. - La Cour de cassation (Cass. 1re civ., 25 juin 2014, n° 11-26.529, P+B+I : [JurisData n° 2014-013860](http://www.lexisnexis.com/fr/droit/search/runRemoteLink.do?A=0.9647446856615166&bct=A&service=citation&risb=21_T20523894789&langcountry=FR&linkInfo=F%23FR%23lnfr%23ref%25013860%25sel1%252014%25year%252014%25decisiondate%252014%25) ; [JCP G 2014, act. 742](http://www.lexisnexis.com/fr/droit/search/runRemoteLink.do?A=0.10262895550679141&bct=A&service=citation&risb=21_T20523894789&langcountry=FR&linkInfo=F%23FR%23fr_jcpg%23article%25742%25sel1%252014%25pubdate%25%2F%2F2014%25art%25742%25year%252014%25), Aperçu rapide Th. Clay) vient d'intervenir pour la deuxième fois dans cette affaire, bien connue. Pour rappel, la société italienne Tecnimont a conclu avec la société grecque Avax, un contrat de sous-traitance pour la construction d'une usine comportant une clause d'arbitrage CCI. Un différend étant né entre les parties, Tecnimont a mis en oeuvre la procédure d'arbitrage. Selon le règlement CCI, la demande de récusation d'un arbitre doit être envoyée, à peine de forclusion, dans les 30 jours suivant la date à laquelle la partie introduisant la demande a été informée des faits et circonstances fondant cette demande. Le 14 septembre 2007, Avax a déposé devant la CCI une requête en récusation contre le président du tribunal arbitral, laquelle a été rejetée le 26 octobre 2007. Le 10 décembre 2007, une sentence partielle a été rendue sur le principe de la responsabilité, contre laquelle Avax a formé un recours en annulation au motif que le président du tribunal aurait manqué à son obligation de révélation et à son devoir d'indépendance. La cour d'appel de Paris a annulé la sentence, la Cour de cassation a cassé l'arrêt d'appel, la cour d'appel de Reims de renvoi a annulé la sentence (CA Reims, 2 nov. 2011, n° 10/02888 : [JurisData n° 2011-028979](http://www.lexisnexis.com/fr/droit/search/runRemoteLink.do?A=0.5304554612763707&bct=A&service=citation&risb=21_T20523894789&langcountry=FR&linkInfo=F%23FR%23lnfr%23ref%25028979%25sel1%252011%25year%252011%25decisiondate%252011%25) ; [JCP G 2011, doctr. 1432](http://www.lexisnexis.com/fr/droit/search/runRemoteLink.do?A=0.9026286382235468&bct=A&service=citation&risb=21_T20523894789&langcountry=FR&linkInfo=F%23FR%23fr_jcpg%23article%251432%25sel1%252011%25pubdate%25%2F%2F2011%25art%251432%25year%252011%25), n° 5, obs. J. Béguin ; Rev. arb. 2012, p. 112, note M. Henry).

**Après cet arrêt, la position de la Cour de cassation était attendue sur deux questions :**

* **la force obligatoire du règlement d'arbitrage auquel les parties se sont soumises et**
* **l'étendue de l'obligation de révélation de l'arbitre.**

Cependant, la Haute juridiction ne se prononce que sur la première, en censurant une fois encore les juges du fond, mais apporte une précision d'importance sur le régime procédural de la contestation de l'indépendance et de l'impartialité d'un arbitre par les parties. Pour dire le moyen d'annulation recevable, la cour de renvoi a retenu que la récusation devant l'institution d'arbitrage et le contrôle de la sentence devant le juge de l'annulation sont des procédures distinctes qui n'ont pas le même objet et ne sont pas soumises à la même autorité, si bien que le juge de l'annulation n'est pas lié par le délai de recevabilité de la demande de récusation auprès de l'institution d'arbitrage, que Tecnimont soutenait être dépassé le 14 septembre 2007 dès lors qu'Avax aurait eu au plus tard connaissance des faits le 26 juillet 2007. Elle a de plus retenu que l'absence de toute demande de récusation ultérieure pour d'autres faits appris par la suite et même après la sentence, n'empêchait pas Avax de critiquer la sentence dans la mesure où celle-ci n'avait pas renoncé à son droit de récusation. Enfin, elle a estimé que les démarches et investigations entreprises par Avax permettaient de ne pas retenir de renonciation d'Avax à invoquer le défaut d'indépendance de l'arbitre en raison du non-exercice de la procédure de récusation devant la CCI.

**La Cour de cassation recadre la cour d'appel en jugeant que celui qui s'abstient, en connaissance de cause, d'exercer, dans le délai prévu par le règlement d'arbitrage applicable, son droit de récusation en se fondant sur toute circonstance de nature à mettre en cause l'indépendance ou l'impartialité d'un arbitre, est réputé avoir renoncé à s'en prévaloir devant le juge de l'annulation.**

Aussi, la cour d'appel devait rechercher si, relativement à chacun des faits et circonstances reprochés à l'arbitre, le délai de 30 jours imparti par le règlement d'arbitrage pour exercer le droit de récusation avait, ou non, été respecté.

La solution est bienvenue. Tout d'abord, il est depuis longtemps admis que lorsqu'une partie participe activement à un arbitrage, elle est « ***réputée avoir renoncé à se prévaloir ultérieurement des irrégularités qu'elle s'est, en connaissance de cause, abstenue d'invoquer devant l'arbitre***» (pour un défaut d'indépendance de l'arbitre, V. CA Paris, 16 mai 2002, ch. 1, sect. C : [JurisData n° 2002-241626](http://www.lexisnexis.com/fr/droit/search/runRemoteLink.do?A=0.8772509480473684&bct=A&service=citation&risb=21_T20523894789&langcountry=FR&linkInfo=F%23FR%23lnfr%23ref%25241626%25sel1%252002%25year%252002%25decisiondate%252002%25) ; Rev. arb. 2003, p. 1231, note E. Gaillard. - CA Paris, 28 oct. 2010, n° 09/20447 : Rev. arb. 2011, p. 691).

La solution a été reprise au nouvel [article 1466 du Code de procédure civile](http://www.lexisnexis.com/fr/droit/search/runRemoteLink.do?A=0.5718756525607034&bct=A&service=citation&risb=21_T20523894789&langcountry=FR&linkInfo=F%23FR%23fr_code%23title%25Code+de+proc%C3%A9dure+civile%25article%251466%25art%251466%25), issu du [décret n° 2011-48 du 13 janvier 2011](http://www.lexisnexis.com/fr/droit/search/runRemoteLink.do?A=0.9225733694596125&bct=A&service=citation&risb=21_T20523894789&langcountry=FR&linkInfo=F%23FR%23fr_acts%23num%252011-48%25sel1%252011%25acttype%25D%C3%A9cret%25enactdate%2520110113%25) et applicable à l'arbitrage international par renvoi de l'article 1506, 3°, qui précise que « la partie qui, en connaissance de cause et sans motif légitime, s'abstient d'invoquer en temps utile une irrégularité devant le tribunal arbitral est réputée avoir renoncé à s'en prévaloir ». Cette partie doit donc exercer son droit de récusation de l'arbitre à bref délai dès lors qu'elle a connaissance des faits qu'elle reproche à celui-ci (Cass. 1re civ., 1er févr. 2012, n° 11-11.084 : [JurisData n° 2012-001290](http://www.lexisnexis.com/fr/droit/search/runRemoteLink.do?A=0.35583925860304366&bct=A&service=citation&risb=21_T20523894789&langcountry=FR&linkInfo=F%23FR%23lnfr%23ref%25001290%25sel1%252012%25year%252012%25decisiondate%252012%25) ; [JCP G 2012, act. 201](http://www.lexisnexis.com/fr/droit/search/runRemoteLink.do?A=0.03416301975102398&bct=A&service=citation&risb=21_T20523894789&langcountry=FR&linkInfo=F%23FR%23fr_jcpg%23article%25201%25sel1%252012%25pubdate%25%2F%2F2012%25art%25201%25year%252012%25), obs. J. Béguin).

Ensuite, le règlement d'arbitrage a un caractère obligatoire pour les parties. **En adhérant au règlement CCI, les parties s'obligeaient donc, à peine de forclusion, à se prévaloir du défaut d'indépendance de l'arbitre au plus tard dans les 30 jours de la date à laquelle elles étaient informées des faits ou circonstances de nature, selon elles, à faire douter de son indépendance**.

Aussi, syllogisme logique, si les parties ne respectent pas ce délai, elles sont présumées avoir renoncé à se prévaloir, devant le juge de l'annulation, des circonstances en cause pour invoquer un défaut d'indépendance ou d'impartialité de l'arbitre.

Comme l'avait justement relevé un auteur, « ***à quoi servirait le règlement d'arbitrage s'il pouvait être contourné par les parties ?***» (Th. Clay, note ss CA Paris, ch. 1, sect. C, 12 févr. 2009, n° 07/22164 : [JurisData n° 2009-375722](http://www.lexisnexis.com/fr/droit/search/runRemoteLink.do?A=0.23039746909046677&bct=A&service=citation&risb=21_T20523894789&langcountry=FR&linkInfo=F%23FR%23lnfr%23ref%25375722%25sel1%252009%25year%252009%25decisiondate%252009%25) ; Rev. arb. 2009, p. 186, spéc. n° 18, p. 195).

**Aussi, le non-respect du délai posé par le règlement d'arbitrage doit être considéré comme privant le demandeur au recours en annulation de la sentence du droit d'invoquer des faits non dénoncés dans le délai stipulé, à tout le moins dès lors que ce délai apparaît raisonnable** (V. nos obs. : [JCP G 2010, doctr. 1286](http://www.lexisnexis.com/fr/droit/search/runRemoteLink.do?A=0.07736884030161117&bct=A&service=citation&risb=21_T20523894789&langcountry=FR&linkInfo=F%23FR%23fr_jcpg%23article%251286%25sel1%252010%25pubdate%25%2F%2F2010%25art%251286%25year%252010%25), n° 2). Au demeurant, l'actuel [article 1456, 3° du Code de procédure civile](http://www.lexisnexis.com/fr/droit/search/runRemoteLink.do?A=0.3650260886005069&bct=A&service=citation&risb=21_T20523894789&langcountry=FR&linkInfo=F%23FR%23fr_code%23title%25Code+de+proc%C3%A9dure+civile%25article%251456%25art%251456%25) précise qu'en cas de différend sur le maintien d'un arbitre, la difficulté est réglée par la personne chargée d'organiser l'arbitrage ou, à défaut, tranchée par le juge d'appui, saisi dans le mois qui suit la révélation ou la découverte du fait litigieux. Le règlement CCI n'est donc pas éloigné de la solution posée par le législateur lui-même.

Reste, dans cette affaire, la question de l'étendue de l'obligation de révélation, question à laquelle la Cour de cassation aura peut-être à répondre si la cour de renvoi s'en saisit, lors d'un énième épisode Tecnimont, série décidément bien (trop) longue.